Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

GARY K. BEHRENS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The following exchange was memorialized in the Resumé of Detective Robert Cardinale's (hereinafter "Detective Cardinale") April 17, 1992 interviews of Megan Behrens and Catherine Thomes Behrens (hereinafter "The Resumé"):

> "Detective asked Megan why she was scared of her daddy, and she said that her daddy spanks her on the private. Detective asked Megan where was her private and she pointed to her buttock." (emphasis supplied).

The Louisiana Court of Appeal, First Circuit (hereinafter "The First Circuit") held that this exchange failed to rise to the level of "Brady Material". Was this error?

2. Susan Vaught (hereinafter "Ms. Vaught") testified as a witness for the State during the trial of the instant proceeding (hereinafter "The Trial") in her capacity as Social Service Specialist III, State of Louisiana, Department of Social Services, Office of Community Service. Ms. Vaught, after The Trial, testified as a witness in a certain juvenile proceeding in The Juvenile Court for the Twenty-Second Judicial District Court, Parish of St. Tammany, State of Louisiana (hereinafter"The Juvenile Proceeding"). A "redacted transcript" of Ms. Vaught's testimony in The Juvenile Proceeding was prepared by the Trial Court, examined by all counsel at the hearing on petitioner, Gary K. Behrens' (hereinafter "Mr. Behrens"), Motion for New Trial, based upon newly discovered evidence involving Ms. Vaught's bias and prejudice, her defect of capacity and her habitual intentional misrepresentation of her educational background, and introduced

QUESTIONS PRESENTED FOR REVIEW – Continued

into evidence by him at the hearing on said Motion (hereinafter "The Redacted Transcript"). The Redacted Transcript reveals information, discussed in greater detail below in the Statement of Case section of this Application, concerning this newly discovered evidence. The First Circuit, deeming Ms. Vaught's role at trial to be too "inconsequential" to justify the granting of a new trial, upheld the Trial Court's denial of Mr. Behrens' Motion for New Trial based upon this newly discovered evidence despite the fact that, consistent with Ms. Vaught's bias and prejudice, the audiotape recording of the April 20, 1992 interview conducted by Detective Cardinale and Ms. Vaught of Megan Behrens (hereinafter "The Interview") reveals that they employed the use of leading questions and the use of repetitive questioning and discounting of responses. Was this error?

3. The Trial Court, over timely objection of defense counsel, permitted Catherine Thomes Behrens, as the claimant in a pending request to The Archdiocese of New Orleans for declaration of the nullity of her marriage to Mr. Behrens, to invoke a privilege as to her request. The First Circuit affirmed the Trial Court's ruling. Was this error?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE FIRST CIRCUIT

The names of all parties to the proceeding in the First Circuit appear in the caption of this case in this Honorable Court.

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OPINIONS DELIVERED BELOW

The September 27, 1996 opinion of The First Circuit, whose judgment is sought to be reviewed, has been designated "Not Designated for Publication" and is reprinted in the Appendix to this Petition. No opinion was delivered by The First Circuit in connection with its December 23, 1996 denial of Mr. Behrens' Petition for Rehearing or by the Supreme Court of Louisiana in connection with its June 20, 1997 denial of Mr. Behrens' Application for Writs of Certiorari, Prohibition and Mandamus.

STATEMENT OF JURISDICTION

A. DATE OF ENTRY OF DECISION OF THE FIRST CIRCUIT SOUGHT TO BE REVIEWED

The First Circuit affirmed Mr. Behrens' conviction and sentence by decision entered September 27, 1996 (hereinafter "The Decision").

B. DATE OF DENIAL OF REHEARING BY THE FIRST CIRCUIT

The First Circuit denied Mr. Behrens' Petition for Rehearing by decision entered December 23, 1996.

C. DATE OF DENIAL OF APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS BY THE SUPREME COURT OF LOUISIANA

The Supreme Court of Louisiana denied Mr. Behrens' Application for Writs of Certiorari, Prohibition and Mandamus by decision entered June 20, 1997.

D. BASIS FOR JURISDICTION

This Honorable Court has jurisdiction over this matter under 28 U.S.C. § 1257 and U.S. Sup. Ct. Rule 13, 28 U.S.C., by virtue of which the Supreme Court may review a decree rendered by a lower state court that is subject to review by the state court of last resort where the state court of last resort has denied discretionary review and a federal question exists.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves Section One of the Fourteenth Amendment to the Constitution of the United States which provides as follows with respect to due process of law:

> AMENDMENT XIV – CITIZENSHIP, PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . "

STATEMENT OF CASE

A. NATURE OF THE CASE

This is a state criminal prosecution arising out of a bill of information charging Mr. Behrens with having, on one occasion between the dates of January 1, 1992 and April 17, 1992, unlawfully violated LSA-R.S. 14:81.2, by sexually abusing his then four year old daughter, Megan Behrens. This charge came on the heels of:

1. Mr. Behrens' May 3, 1991 acquittal of having allegedly sexually abused his older daughter, Jennifer Behrens;

2. The State of Louisiana, Office of Community Services having opined as of July 15, 1991 that " . . . Ms. Behrens is dissatisfied with any visitation between the children and their father[,]".

3. Sherry Sigler, O.C.S., having opined as of July 15, 1991 that " . . . the conflict between the parents is the central issue that directly

impacts on the children." (emphasis supplied)

4. Mr. Behrens' having been restored to unsupervised visitation privileges in December, 1991;

5. The preparation of a request, on December 31, 1991, by Mr. Behrens' former wife, Catherine Thomes Behrens (hereinafter "Ms. Behrens"), with whom he had been engaged in disputed child visitation issues over a period of several years, for declaration of nullity of her marriage to him and other matters incidental thereto, the filing of which with the Archdiocese of New Orleans was delayed by Ms. Behrens until July 22, 1992;

6. Mr. Behrens' preparing to exercise holiday visitation with Megan for the first time ever; and

7. Megan having realized, on Good Friday, 1992, that she wanted to be at home, instead of her father's house, when the Easter Bunny came on Sunday morning.

B. INVESTIGATION OF ALLEGATIONS

The following parties participated in the investigation of the allegations against Mr. Behrens (hereinafter "The Allegations"):

a. Megan Behrens:

Having found herself on the proverbial "horns of a dilemma" concerning the arrival of the Easter Bunny,

Megan Behrens clearly had a motive to fabricate The Allegations, particularly in view of her awareness that she had not been allowed to visit her father's home following previous similar allegations against him by her sister, Jennifer.

More importantly, Megan Behrens' disclosure to Detective Cardinale, on April 17, 1992, that she was afraid of her father because he spanks her on the buttock, indicated at least a competing explanation, if not the underlying reason, for The Allegations.

b. Ms. Behrens:

During her trial testimony, Ms. Behrens admitted that she was a convicted thief. Equally important, the trial testimony of Richard R. Cicinelli, M.D. (hereinafter "Dr. Cicinelli") stated his opinion as of April 27, 1990 that:

> "Ms. Behrens presents her husband in consistently pejorative terms that leads one to wonder if she is unable to conceptualize her husband in a realistic fashion, which would include strengths and weaknesses rather than the confines of a black and white model. If this is a problem for her, then she might subconsciously be unable to separate from her husband without perceiving him in a totally negative way. This would make it difficult for her to allow her children to form their own relationship with him in a healthy manner. The children could possibly become involved with such a conflict, withdrawn from their father, and then they conceive of the results as a problem due to the father."

c. Detective Cardinale:

The Resumé reveals Detective Cardinale's trial testimony to be false. Equally important, the audiotape recording of The Interview reveals The Interview to have been contaminated by virtue of the employment by Detective Cardinale and Ms. Vaught of the use of leading questions and the use of coercion by repetitive questioning and discounting of responses (hereinafter collectively "Suggestive Interview Techniques"). Incredibly, prior to The Trial, Detective Cardinale had no specialized training concerning the interviewing of alleged child victims of sexual abuse.

d. Susan Vaught, O.C.S.:

Ms. Vaught was, herself, a victim of parental sexual abuse during her childhood. Although Ms. Vaught represented herself during The Trial as having received a masters degree in psychology from LSU, in truth and in fact she received a masters of education degree with a major in special education and a minor in psychology from LSU. Ms. Vaught intentionally misrepresented herself to the Board of Directors of Christ Episcopal School, Covington, Louisiana in 1988 as being a graduate of Yale University, as having received a doctorate in clinical psychology from the University of North Carolina and as then being a staff psychologist at Charity Hospital, New Orleans, Louisiana. Although Ms. Vaught testified on November 5, 1993 at a deposition taken in connection with a civil case then pending in federal district court (Mayronne) that she had received a masters degree in psychology from LSU, in truth and in fact she received a

masters of education degree with a major in special education and a minor in psychology from LSU. Ms. Vaught intentionally misrepresented herself to the Board of Directors of the Parenting Center of West St. Tammany, Covington, Louisiana in 1988 as having a doctorate. Ms. Vaught illegally converted to her own use in 1991 substantial sums belonging to a business which she operated with Kay Miller. Ms. Vaught's role in the investigation of The Allegations was substantial.

e. Dr. Curtis:

Dr. Curtis testified at trial that her physical findings were "non-specific".

C. PRIOR PROCEEDINGS:

Following the November 13, 1992 filing by the State of Bill of Information numbered 212039 against Mr. Behrens, he, on December 14, 1992, pleaded not guilty. Thereafter, discovery motions were filed by Mr. Behrens and disposed of by the Trial Court after pre-trial hearing and in camera inspection. At the hearing of Mr. Behrens' Motion for Preliminary Examination, the State elected not to present any evidence whatsoever, and, accordingly, the Trial Court found no probable cause to charge Mr. Behrens with the offense charged or with a lesser included offense and released him from bail. At the hearing of the State's discovery motion, the State informed the Trial Court that it was satisfied with Mr. Behrens' discovery answers.

On March 28, 1994, this matter came on for jury trial. In the courtroom, after completion of jury selection and immediately prior to the commencement of The Trial, the undersigned counsel was informed by the State for the first time as to the existence, but not the contents, of The Resumé. The Trial Court, via pre-trial in camera inspection, refused to permit discovery and inspection by Mr. Behrens of The Resumé but held Mr. Behrens entitled to inspection of the records maintained by the Archdiocese of New Orleans relating to the request by Ms. Behrens for declaration of nullity of her marriage to Mr. Behrens and other matters incidental thereto. On March 30, 1994, the jury returned a guilty verdict. Thereafter, post-verdict motions were filed by Mr. Behrens and disposed of by the Trial Court after hearing. On May 2, 1994, during the course of his review of the report of the presentence investigation ordered by the Trial Court, the undersigned counsel became aware for the first time of the contents of The Resumé, pertinent portions whereof read as follows:

> **"Detective asked Megan why she was scared of her daddy, and she said that her daddy spanks her on the private. Detective asked Megan where was her private and she pointed to her buttock."** (emphasis supplied).

On May 6, 1994, the Trial Court denied Mr. Behrens' Motion for New Trial based upon the State's failure to disclose The Resumé, Mr. Behrens was sentenced to 42 months at hard labor, and the Trial Court informed him as to the time limits applicable to the filing of applications for post-conviction relief.

Thereafter, Mr. Behrens appealed to The First Circuit but this case was remanded to the Trial Court for a

hearing on Mr. Behrens' Motion for New Trial filed in the Trial Court based upon newly discovered evidence involving Ms. Vaught's bias and prejudice, her defect of capacity and her habitual intentional misrepresentation of her educational background. After hearing and in camera inspection, all preliminary motions were disposed of by the Trial Court. Thereafter, Mr. Behrens' Motion for New Trial was disposed of by the Trial Court after hearing, The First Circuit affirmed Mr. Behrens' conviction and sentence, subject to the case being remanded to the Trial court for purposes of correction of the May 6, 1994 minute entry so as to properly afford Mr. Behrens credit for time served, the First Circuit denied Mr. Behrens' application for rehearing and the Supreme Court of Louisiana denied Mr. Behrens' Application for Writs of Certiorari, Prohibition and Mandamus.

This case now comes before this Honorable Court for review.

D. RAISING OF FEDERAL QUESTIONS

1. The federal question whether portions of The Resumé constitute "Brady Material" was first raised by Mr. Behrens in the Trial Court through the filing on May 6, 1994 of a Motion for New Trial, together with a Memorandum in support thereof, based upon the State's failure to disclose The Resumé. Thereafter, this federal question was raised by Mr. Behrens in the Trial Court through the filing on June 28, 1994 of his Assignment of Errors (Assignments of Error No. 5 and 6). This federal question was raised by Mr. Behrens in The First Circuit through the filing on September 29, 1995 of his Original

Brief on the Merits (Assignments of Error No. 5 and 6); the filing on November 16, 1995 of his Reply Brief on the Merits; and the filing on October 8, 1996 of his Application for Rehearing. This federal question was raised by Mr. Behrens in the Supreme Court of Louisiana through the filing on January 23, 1997 of his Application for Writs of Certiorari, Prohibition and Mandamus (Assignments of Error No. 10-19).

The First Circuit (in The Decision), affirming the Trial Court (in its Reasons for Judgment on Motion for New Trial), ruled that The Resumé failed to rise to the level of "Brady Material". However, the following facts are not mentioned in The Decision:

a. The Resumé reveals Detective Cardinale's trial testimony to be false;

b. Mr. Behrens was absolutely incapable of knowing Detective Cardinale's trial testimony to be false and, accordingly, utterly powerless to impeach Detective Cardinale in the presence of the jury;

c. Counsel for the State failed to take appropriate remedial measures when Detective Cardinale testified falsely;

d. The prejudice to Mr. Behrens resulting from the State's failure to disclose The Resumé was compounded by the jury's consideration, during deliberation, of the contents of Detective Cardinale's April 17 and 20, 1992 interviews of Megan Behrens.

e. The prejudice to Mr. Behrens resulting from the State's failure to disclose The Resumé was compounded by the State's repeated attempts to underscore the unfamiliarity of Steven D. Thurber, Ph.D. (hereinafter "Dr. Thurber") with the contents of The Resumé;

f. Megan Behrens' disclosure to Detective Cardinale, on April 17, 1992, that she was afraid of her father because he spanks her on the buttock, constituted much more than another inconsistency – such disclosure indicated at least a competing explanation, if not the underlying reason, for The Allegations.

g. According to The Resumé, Megan Behrens disclosed to Detective Cardinale that although her father told her that he was "looking for boogers", he only found one and "daddy ate the booger."

2. The federal question whether Ms. Vaught's bias and prejudice resulting from her being, herself, a victim of parental sexual abuse during her childhood, coupled with her intentional misrepresentation of her educational background during The Trial and her defect of capacity, deprived Mr. Behrens of his basic fundamental right to an uncontaminated trial was first raised by Mr. Behrens in the Trial Court through the filing on January 24, 1995 of a Motion for New Trial, together with a Memorandum in support thereof, based upon newly discovered evidence involving Ms. Vaught's bias and prejudice, her defect of capacity and her habitual intentional misrepresentation of her educational background. Thereafter, this federal question was raised by Mr. Behrens in the Trial Court through the filing on August 11, 1995 of his Supplemented Assignment of Errors (Assignment of Error No. 12). This federal question was raised by Mr. Behrens in The First Circuit through the filing on September 29, 1995 of his Original Brief on the Merits (Assignment of Error No. 12); the filing on November 16, 1995 of his Reply Brief on the Merits; and the filing on October 8, 1996 of his Application for Rehearing. This federal question was raised by Mr. Behrens in the Supreme Court of Louisiana

through the filing on January 23, 1997 of his Application for Writs of Certiorari, Prohibition and Mandamus (Assignments of Error No. 1, 26-28).

The Trial Court (in its Reasons for Judgment on Motion for New Trial dated July 3, 1995), deemed Ms. Vaught's role at trial to be limited and, accordingly, deemed this newly discovered evidence to be too immaterial to justify the granting of a new trial. The First Circuit (in The Decision), deeming Ms. Vaught's role at trial to be too "inconsequential" to justify the granting of a new trial, upheld the Trial Court's denial of Mr. Behrens' Motion for New Trial based upon this newly discovered evidence despite the fact that, consistent with Ms. Vaught's bias and prejudice, the audiotape recording of the April 20, 1992 interview conducted by Detective Cardinale and Ms. Vaught of Megan Behrens reveals that they employed the use of leading questions and the use of repetitive questioning and discounting of responses.

3. The federal question whether Ms. Behrens', as the claimant in a pending request to The Archdiocese of New Orleans for declaration of the nullity of her marriage to Mr. Behrens, being permitted to invoke a privilege as to her request deprived Mr. Behrens of his basic fundamental right of confrontation was first raised by Mr. Behrens in the Trial Court through timely objection of defense counsel (at Rec. Vol. 2, pp. 464, 465) to the Trial Court's permitting Ms. Behrens to invoke a privilege as to her request. Thereafter, this federal question was raised by Mr. Behrens in the Trial Court through the filing on June 28, 1994 of his Assignment of Errors (Assignment of Error No. 9). This federal question was raised by Mr. Behrens in The First Circuit through the filing on September 29, 1995

of his Original Brief on the Merits (Assignment of Error No. 9) and the filing on November 16, 1995 of his Reply Brief on the Merits. This federal question was raised by Mr. Behrens in the Supreme Court of Louisiana through the filing on January 23, 1997 of his Application for Writs of Certiorari, Prohibition and Mandamus (Assignment of Error No. 24).

The Trial Court, over timely objection of defense counsel (at Rec. Vol. 2, pp. 464, 465), permitted Ms. Behrens, as the claimant in a pending request to The Archdiocese of New Orleans for declaration of the nullity of her marriage to Mr. Behrens, to invoke a privilege as to her request. The First Circuit (in The Decision) affirmed the Trial Court's ruling.

REASONS FOR GRANTING WRIT

A. UNDISCLOSED BRADY MATERIAL:

In the courtroom, after completion of jury selection and immediately prior to the commencement of The Trial, the undersigned counsel was informed by the State for the first time as to the existence, but not the contents, of The Resumé. The trial testimony of Detective Cardinale established that Megan Behrens made certain material inconsistent statements to him. However, the full extent to which material inconsistent statements were made by Megan Behrens to Detective Cardinale could not have been ascertained by Mr. Behrens without discovery and inspection of The Resumé. The motion for discovery filed by Mr. Behrens on December 14, 1992, as well as the amended motion for discovery filed by Mr. Behrens on

February 16, 1993, suggested to the Court that the State be ordered to permit discovery and inspection including "Brady Material".

This Court, in *Giglio v. United States*, 405 U.S. 150, 153 (1972), recognized the fact that impeachment evidence falls within the 'Brady rule' where the credibility of the witness may be determinative of guilt or innocence. See also *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995). To the extent that prior statements of Megan Behrens and Ms. Behrens might be material to impeach Megan Behrens' credibility, Mr. Behrens was clearly entitled to discovery and inspection of any resumés of interviews of Megan Behrens or Ms. Behrens conducted by the St. Tammany Parish Sheriff's Office. See *Giglio, Bagley* and *Kyles*. In view of the fact that the State's case against Mr. Behrens depended entirely upon Megan Behrens' credibility, Mr. Behrens' ability to impeach Megan Behrens through proving prior inconsistent statements was of paramount importance. See *Giglio, Bagley* and *Kyles*.

On March 28, 1994, the Trial Court, pursuant to in camera inspection, refused to permit discovery and inspection by Mr. Behrens of The Resumé. On May 2, 1994, during the course of his review of the report of the presentence investigation ordered by this Court, the undersigned counsel became aware for the first time of the contents of The Resumé. The following portion of The Resumé establishes that material inconsistent statements, in addition to those noted hereinabove, were in fact made by Megan Behrens to Detective Cardinale:

> **"Detective asked Megan why she was scared of her daddy, and she said that her daddy spanks her on the private. Detective asked Megan where was her private and she pointed to her buttock."** (emphasis supplied).

This portion of The Resumé is also suggestive of competing explanations for The Allegations. Accordingly, this portion of The Resumé constitutes both impeachment and exculpatory evidence within the contemplation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Another portion of The Resumé establishes that material inconsistent statements, in addition to those noted hereinabove, were in fact made by Megan Behrens to Detective Cardinale. In this portion of The Resumé, it is established that although Mr. Behrens told her that he was "looking for boogers", he only found one and "daddy ate the booger." Of course, during The Interview, Megan Behrens, concerning Mr. Behrens's finger, responded "He wiped it on a towel" to the question "Did he wipe it on, on a towel, or did he put it near his face, or, or what did he . . . ?" This portion of The Resumé is also suggestive of the total unreliability of Megan Behrens' trial testimony.

It is well-settled that a *Brady* violation is established " . . . by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." See *Kyles* at 1566. By virtue of the above and foregoing portions of The Resumé, particularly in view of the aforesaid testimonies of Sherry Sigler and Dr. Cicinelli and the testimony of Dr. Thurber noted hereinbelow, The Resumé should have been disclosed to Mr. Behrens prior

to trial and the failure of the State to have made such disclosure prejudiced him in his attempt to show the unreliability of Megan Behrens' trial testimony to such an extent that confidence in the outcome of The Trial is undermined. See *Bagley* at 682 and *Kyles* at 1566. More particularly, had The Resumé been disclosed to him prior to trial, Mr. Behrens would have been able to build his entire defense around "spanking" as the underlying reason for The Allegations. Although it cannot be conclusively determined at this juncture that the jury would have in fact accepted "spanking" as the underlying reason for The Allegations, " . . . the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [Megan Behrens'] testimony . . . " *Davis v. Alaska,* 415 U.S. 308, 318 (1974). The prejudice to Mr. Behrens resulting from the State's failure to disclose The Resumé was compounded by the state's repeated attempts to underscore the fact that Dr. Thurber was unfamiliar with the contents of Detective Cardinale's April 17, 1992 interview of Megan Behrens and the jury's consideration, during deliberation, of the contents of Detective Cardinale's April 17 and 20, 1992 interviews of Megan Behrens.

B. MATERIAL CONTRADICTORY STATEMENTS OF DETECTIVE CARDINALE:

During The Trial, Detective Cardinale testified as follows:

". . . .

Q. Did she tell you on April 17th that her dad had touched you (sic) on her back private part?

A. No sir, she did not.

Q. Did she tell you that her dad had touched her on her front private part on April 17th?

A. Yes, sir.

. . . . "

Detective Cardinale's above trial testimony contradicts the following portion of his April 17, 1992 resumé:

> **"Detective asked Megan why she was scared of her daddy, and she said that her daddy spanks her on the private. Detective asked Megan where was her private and she pointed to her buttock."** (emphasis supplied).

The Resumé reveals Detective Cardinale's trial testimony to be false. Mr. Behrens, however, being uninformed as to the contents of The Resumé, was absolutely incapable of knowing Detective Cardinale's trial testimony to be false and, accordingly, utterly powerless to impeach Detective Cardinale in the presence of the jury. Incredibly, counsel for the State failed to take appropriate remedial measures at the time Detective Cardinale testified falsely. Unquestionably, counsel for the State should have either immediately disclosed The Resumé to Mr. Behrens or immediately notified the Trial Court that Detective Cardinale had testified falsely so that it could modify its previous ruling concerning disclosure of The Resumé. See *Brady, Giglio* at 153, *Bagley* and *Kyles*. The failure of counsel for the State to have made such disclosure or given

such notice deprived Mr. Behrens of the opportunity to show the total unreliability of the witness who, according to The Decision, was solely responsible for the criminal investigation of The Allegations. See *Brady, Giglio, Bagley, Kyles* and *Davis*. Moreover, the failure of counsel for the State to have made such disclosure or given such notice deprived Mr. Behrens of the opportunity to move for a mistrial. Clearly, the prejudice to Mr. Behrens resulting from the State's failure to disclose The Resumé prior to trial was compounded by the State's failure to take appropriate remedial measures at the time Detective Cardinale testified falsely. See *Brady, Giglio* at 153, *Bagley* and *Kyles*. Such prejudice was further compounded by the jury's consideration, during deliberation, of the contents of Detective Cardinale's April 17 and 20, 1992 interviews of Megan Behrens. Such prejudice was even further compounded by the State's repeated attempts to underscore Dr. Thurber's unfamiliarity with the contents of The Resumé. It is unconscionable for the State to refuse to disclose *Brady* Material and then to attack Dr. Thurber's inability to testify concerning the contents of the very *Brady* Material which it has refused to disclose. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Bagley* at 676. "A new trial is required if 'the false testimony could in any reasonable likelihood have affected the judgment of the jury.' " *Giglio* at 154 [Citing in part *Napue v. Illinois Lindsey*, 360 U.S. 264 (1959)]. Unquestionably, Detective Cardinale, by testifying falsely, effectively bolstered his own

credibility in the eyes of the jury and thus contributed to the verdict. It is inconceivable that Detective Cardinale's false testimony was, as to his own credibility, "harmless beyond a reasonable doubt". See *Chapman v. California*, 386 U.S. 18 (1967).

Megan Behrens' disclosure to Detective Cardinale, on April 17, 1992, that she was afraid of her father because he spanks her on the buttock, constituted at least a competing explanation, if not the underlying reason, for The Allegations. This Honorable Court has explicitly " . . . recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis* at 316-317. The failure of the State to have taken appropriate remedial measures at the time Detective Cardinale testified falsely prejudiced Mr. Behrens in his attempt to show the unreliability of Megan Behrens' trial testimony and, even more importantly, deprived Mr. Behrens of his basic fundamental right to meaningful cross-examination of Megan Behrens, as his accuser. See *Davis* and *Bagley*. Unquestionably, Detective Cardinale, by testifying falsely, effectively bolstered Megan Behrens' credibility in the eyes of the jury and thus contributed to the verdict. It is inconceivable that Detective Cardinale's false testimony was, as to Megan Behrens' credibility, "harmless beyond a reasonable doubt". See *Chapman v. California*, 386 U.S. 18 (1967).

C. CONTAMINATION OF THE INTERVIEW:

1. SUGGESTIVE INTERVIEW TECHNIQUES

In conducting The Interview, Detective Cardinale and Ms. Vaught employed the use of Suggestive Interview Techniques. The testimony elicited by the undersigned counsel during the course of his direct examination of Dr. Thurber at The Trial provided a comprehensive analysis of the reasons for which Detective Cardinale's/Ms. Vaught's use of Suggestive Interview Techniques contaminated The Interview. It is extremely noteworthy that Dr. Thurber was accepted by the Trial Court as an expert in the field of clinical and pediatric psychology and child development, with special emphasis on the investigation of child sexual abuse. Dr. Thurber's testimony evidenced his firm belief that The Interview was contaminated. The audiotape recording of The Interview reveals such interview to be contaminated. Mr. Behrens strongly urges and requests this Honorable Court, in view of the significance of this audiotape recording, to review this audiotape recording in its entirety. This audiotape recording is included in the appeal record.

2. EFFECTS OF CONTAMINATION ON SUBSEQUENT STATEMENTS

Dr. Thurber's testimony evidenced his firm belief that contamination of an interview of an alleged victim of child sexual abuse may render subsequent statements of such alleged victim unreliable.

D. IMPARTIALITY:

The prejudice to Mr. Behrens resulting from Ms. Vaught's contamination of The Interview was compounded by the State's repeated attempts to underscore its contention that Ms. Vaught was an "impartial investigator". The above and foregoing information revealed by The Redacted Transcript shows that not only was Ms. Vaught far from "impartial", but that she also has suffered from a defect of capacity.

Unfortunately for Mr. Behrens, he only became aware of this information after this case had been tried. Although Mr. Behrens presented testimony from Dr. Thurber at The Trial concerning contamination by Ms. Vaught of The Interview, no reason whatsoever existed for him to investigate the possibility of further impeaching Ms. Vaught through proving her bias and prejudice, her defect of capacity, and her habitual intentional misrepresentation of her educational background. On the other hand, in the event that the State had been in possession, custody, control or knowledge of matters sufficient to constitute such a reason, it would have been required to disclose them to Mr. Behrens. See *Giglio*, *Bagley* and *Kyles*. No such disclosures were made.

Mr. Behrens' ability to impeach Ms. Vaught, as the investigator having assumed the lead role in the conducting of The Interview, was of paramount importance.

Ms. Vaught's bias and prejudice resulting from her being, herself, a victim of parental sexual abuse during her childhood renders her incapable of having fairly evaluated The Allegations. Had the fact that Ms. Vaught is,

herself, a victim of parental sexual abuse during her childhood been discovered by him prior to trial, Mr. Behrens would have been able to build his entire defense around Ms. Vaught's own victimization as the underlying reason for The Allegations and would have been able to destroy her credibility in the presence of the jury. For instance, Dr. Thurber could have testified concerning the fact that in situations involving allegations of child sexual abuse, countertransference reactions within an evaluator who is, herself, a victim of parental sexual abuse during her childhood, are likely to erupt resulting in a bias against the alleged perpetrator. See Freedman, Rosenberg, Gettman-Felzien and Van Scoyk, *"Evaluator Countertransference In Child Custody Evaluations"*, 11 American Journal of Forensic Psychology 61, 70 (1993). In view of the comprehensive nature and significance of this article, Mr. Behrens strongly urges and requests this Honorable Court to review same. Machine copies of this article as well as numerous other articles concerning contamination of interviews of alleged child victims of sexual abuse are included in the appeal record.

Two "training manuals" were produced by O.C.S. for in camera inspection by the Trial Court, ordered filed with the record by the Trial Court and examined by counsel for Mr. Behrens pursuant to the order of the Trial Court. By virtue of her bias and prejudice and her defect of capacity, Ms. Vaught was incapable of carrying out this official policy of O.C.S. which, among other rules, required her to be a "bias-free professional".

Her habitual intentional misrepresentation of her educational background prior to The Trial reflects her willingness to lie in order to achieve greater standing in

the eyes of her associates. In view of her habitual intentional misrepresentation of her educational background prior to The Trial, her misrepresentation of her educational background during The Trial can only be construed to be intentional and, as such, reflects her willingness to lie in an effort to bolster her credibility before the jury. Had the fact that Ms. Vaught had habitually intentionally misrepresented her educational background prior to The Trial and had intentionally misrepresented her educational background during The Trial been discovered by him prior to or during trial, Mr. Behrens would have been able to destroy her credibility in the presence of the jury.

Ms. Vaught's bias and prejudice resulting from her being, herself, a victim of parental sexual abuse during her childhood, coupled with her intentional misrepresentation of her educational background during The Trial, deprived Mr. Behrens of his right to an uncontaminated trial. See *Idaho v. Wright*, 110 S.Ct. 3139, 3152-53 (1990); *Sanders v. English*, 950 F.2d 1152, 1160 (5th Cir. 1992); *Hale v. Fish*, 899 F.2d 390, 403 (5th Cir. 1990); *Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir. 1987), writ denied; *Robison v. Via*, 821 F.2d 913, 920 (2nd Cir. 1987).

Had the new material evidence been discovered by him prior to trial, Mr. Behrens would have been able to impeach Ms. Vaught. Moreover, had this information been adduced and/or introduced at The Trial, it would probably have changed the verdict. Mr. Behrens' inability to impeach Ms. Vaught prevented him from presenting a motive to the jury for her contamination of The Interview, and prevented the jury from concluding that, due to such contamination and the probability that she contaminated other non-recorded communications by her with Megan

Behrens prior to and subsequent to The Interview, Megan Behrens' trial testimony was unreliable. Had Mr. Behrens been able to present such a motive, the jury would have been able to consider it at the same time it was considering, during deliberation, the contents of Detective Cardinale's April 17, 1992 interview of Megan Behrens and The Interview.

E. MS. VAUGHT'S ROLE

For the above and foregoing reasons, Ms. Vaught's role in the investigation of The Allegations was substantial. The prejudice to Mr. Behrens resulting from Ms. Vaught's contamination of The Interview and her probable contamination of other non-recorded communications by her with Megan Behrens prior to and subsequent to The Interview is enormous. Accordingly, any attempt by the State to minimize Ms. Vaught's role at trial is insufficient to purge the contaminating effect of Ms. Vaught's pre-trial misconduct.

Ms. Vaught testified as a witness for the State during The Trial in her capacity as Social Service Specialist III, State of Louisiana, Department of Social Services, Office of Community Service. In view of the State's repeated attempts during The Trial to underscore its contention that Ms. Vaught was an "impartial investigator", it is obvious that it recognized the importance of Ms. Vaught's role at trial. Mr. Behrens' ability to impeach Ms. Vaught, as the investigator having assumed the lead role in the conducting of The Interview, was of paramount importance. Accordingly, any attempt by the State to minimize Ms. Vaught's role at trial is unfounded.

F. RIGHT OF CONFRONTATION VS. CLERGYMAN-PENITENT PRIVILEGE

On March 28, 1994, the Trial Court, pursuant to in camera inspection, held Mr. Behrens entitled to inspection of the records maintained by the Archdiocese of New Orleans (hereinafter "The Archdiocese") relating to the request by Ms. Behrens for declaration of nullity of her marriage to Mr. Behrens and other matters incidental thereto. Nonetheless, the Trial Court, over timely objection of defense counsel, permitted Ms. Behrens to invoke a privilege as to her request to The Archdiocese for declaration of the nullity of her marriage to Mr. Behrens.

By the very nature of her request, Ms. Behrens was well aware that any communication made by her to The Archdiocese would be disclosed to the Metropolitan Tribunal and could possibly be disclosed to Mr. Behrens and other interested parties by the Metropolitan Tribunal in connection with his participation in its investigations of the factual basis of such request, its evaluations of such request and its decisions rendered in connection with such request. It is noteworthy in this regard that the records maintained by The Archdiocese relating to the request by Ms. Behrens for declaration of nullity of her marriage to Mr. Behrens include statements from third parties.

As the claimant in a pending request to The Archdiocese for declaration of the nullity of her marriage to Mr. Behrens, Ms. Behrens clearly stood to benefit in the event that Mr. Behrens was convicted of having sexually abused Megan Behrens. The exclusion by the Trial court of evidence of such request prejudiced Mr. Behrens in his

attempt to show the existence of this motive on the part of Ms. Behrens. See *Davis* at 316-317. To the extent that, under the laws of the State of Louisiana, a clergyman-penitent privilege exists in Ms. Behrens' favor, Mr. Behrens' right of confrontation is, unquestionably, paramount to any State of Louisiana policy of protecting Ms. Behrens in this instance. See *Davis* at 316-317. "Whatever temporary embarrassment might result to [Ms. Behrens] by disclosure of [her request to The Archdiocese for declaration of the nullity of her marriage to Mr. Behrens] . . . is outweighed by [Mr. Behrens'] right to probe into the influence of possible bias in the testimony of a crucial [witness against him]". *Davis* at 319.

G. RULE 10 CONSIDERATIONS

As will be more fully shown by reference to the above-cited decisions, The Decision conflicts with relevant decisions of this Honorable Court.

For this reason, this case is appropriate for review by this Honorable Court.

CONCLUSION

WHEREFORE, Mr. Behrens prays that for the above and foregoing reasons, a writ of certiorari issue to review The Decision and, after due consideration, The Decision be reversed and this case be remanded to the Trial Court for a new trial.

Respectfully submitted,

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APPENDIX A

The September 27, 1996 opinion of the First Circuit, whose judgment is sought to be reviewed, is reprinted in this Appendix.

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number: 95/KA/1854 DATE: SEP 27 1996

STATE OF LOUISIANA

VERSUS

GARY BEHRENS

TO:

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2217 Second Street
Slidell, LA 70458

Office of District Attorney
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Covington, LA 70434

William R. Campbell, Jr.
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New Orleans, LA 70130

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

/s/ Karen West
STANLEY P. LIMOINE,
CLERK
COURT OF APPEAL,
FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.CP. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

95 KA 1854

STATE OF LOUISIANA

VERSUS

GARY BEHRENS

JUDGMENT RENDERED:
September 27, 1996

ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 212039), PARISH OF ST. TAMMANY,
STATE OF LOUISIANA

HONORABLE FRANCE W. WATTS, III, JUDGE

* * *

Walter Reed, District Attorney Covington, Louisiana	Counsel for Plaintiff/Appellee, State of Louisiana
Terry Boudreaux Gretna, Louisiana	Counsel for Plaintiff/Appellee, State of Louisiana
Joseph P. Anderson, Jr. Slidell, Louisiana	Counsel for Defendant/ Appellant, Gary Behrens

* * *

BEFORE: CARTER, PARRO AND McDONALD[1], JJ.

McDONALD, judge, *pro tempore*

The defendant, Gary Behrens, was charged by bill of information with one count of molestation of a juvenile, a violation of La. R.S. 14:81.2. He pled not guilty, and after trial by jury, was found guilty as charged. He was subsequently sentenced to 42 months in prison at hard labor with credit for time served. He has appealed, urging 15 assignments of error.

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[1] Judge J. Michael McDonald, Nineteenth Judicial District Court, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

FACTS

On April 17, 1992, while preparing to visit her father (the defendant), the 4-year-old victim told her mother that she did not want to visit the defendant because he was mean. She then indicated that he had touched her vaginal area. The victim's mother took the victim to the St. Tammany Parish Sheriff's Office where she reported the victim's allegations. After an investigation, the defendant was arrested.

ASSIGNMENTS OF ERROR NUMBERS 1 AND 3

In assignment of error number 1, the defendant contends that there was insufficient evidence to support the jury's verdict. In assignment of error number 3, he contends that the trial court erred in denying his motion for post verdict judgment of acquittal. In his brief to this court, he argues that the victim's taped statement was contaminated and unreliable, the testimony of the victim's mother indicated that there were other explanations for the victim not wanting to visit the defendant, and the victim's mother was not a credible witness because she was a "convicted thief." The defendant also argues that the expert testimony was suggestive of numerous competing explanations for the allegations against him; and the victim's testimony was inconsistent and suggestive of competing explanations for the allegations against him. In his reply brief, he argues that the jury must make rational credibility determinations and under ***State v. Mussall,*** 523 So.2d 1305 (La. 1988), an appellate court is empowered to consider whether a criminal jury made a rational credibility determination. He contends that,

because the State's entire case hinged upon the victim's veracity, a rational trier of fact would have found her trial testimony to be unreliable.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. *See* La. C.Cr.P. art. 821; ***State v. King,*** 563 So.2d 449, 456 (La. App. 1st Cir.), *writ denied,* 567 So.2d 610 (La. 1990). This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. ***State v. Polkey,*** 529 So.2d 474, 476 (La. App. 1st Cir. 1988), *writ denied,* 536 So.2d 1233 (La. 1989).

Louisiana Revised Statute 14:81.2(A) defines molestation of a juvenile as:

> [T]he commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

The testimony of the victim alone is sufficient to prove the elements of the offense. Further, the trier of fact

may accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. ***State v. Johnson,*** 529 So.2d 466, 473 (La. App. 1st Cir. 1988), *writ denied,* 536 So.2d 1233 (La. 1989).

On April 17, 1992, Officer Robert Cardinale of the St. Tammany Parish Sheriff's Office met Cathy Behrens and her two daughters, one of whom was the victim, at the sheriff's office. After speaking with Ms. Behrens, Cardinale interviewed the victim for approximately one hour while Ms. Behrens and her other daughter waited in a separate area. Cardinale then contacted the Office of Community Services (OCS) to set up an interview with the victim. Cardinale stated that it was "very common" for him to work with OCS. On April 20, 1992, Cardinale and Susan Vaught, the OCS representative, met with Ms. Behrens and the victim. Cardinale and Vaught subsequently interviewed the victim out of the presence of Ms. Behrens. The interview was tape-recorded. After the interview, Vaught made an appointment with Dr. Joan Curtis for a physical examination of the victim. Cardinale was given a report of Curtis' examination of the victim and he subsequently interviewed Curtis. Cardinale also interviewed Judy Laurendine, a board certified social worker, who counseled the victim. After gathering all of the information, he requested an arrest warrant for the defendant.

Susan Vaught testified that she was a social service specialist for OCS and became involved in the instant

case after receiving a referral based on a report called into the office. At that time, it was customary for OCS to become involved in investigations of child abuse. Vaught did not form an immediate opinion concerning the allegations of abuse and considered herself to be an impartial investigator. Upon receipt of the report involving the victim, she contacted the reporter of the abuse and made arrangements to interview the victim. She was unable to name the reporter of the abuse due to confidentiality rules. On April 20, 1992, Vaught and Cardinale interviewed the victim at the St. Tammany Parish Sheriff's Office. Prior to the interview, outside the presence of the victim, Vaught spoke with Ms. Behrens concerning the allegations. After interviewing the victim, she conducted an additional investigation and made arrangements for Dr. Curtis to physically examine the victim. Vaught accompanied the victim to the examination and spoke with Dr. Curtis prior to the examination. Vaught interviewed a number of people as part of her investigation, including the victim's mother and sister, a day care worker where the victim attended day care, the defendant, and Mary Smith, who lived with the defendant at the time with her two sons. She also made arrangements to have both the victim and Ms. Behrens evaluated.

Dr. Joan Curtis, who was qualified as an expert in the fields of family practice and emergency medicine with a subspeciality in the medical examination of children for evidence of sexual abuse, testified that she examined the victim on April 27, 1992. The victim was accompanied to her office by her mother and Vaught. Prior to talking with the victim and her mother, Curtis spoke with Vaught about the case. Curtis performed a physical examination

of the victim wherein she found a 6 millimeter hymenal opening. Curtis explained that a child of the victim's age is generally expected to have a 4 millimeter opening. Curtis also found that the posterior rim of the hymen appeared somewhat thickened and shortened. According to Curtis, these findings were considered nonspecific because they could have been the result of sexual abuse or a nonsexual abuse situation, such as a severe infection, irritation from allergies, or chicken pox. However, Curtis reviewed the victim's pediatric records and found that she previously was treated only for an external yeast infection, and although she had had chicken pox, there was no notation of lesions on the genitals.

Curtis testified that she normally categorized her examination results. She explained that category 1 consisted of normal examinations; category 2 consisted of findings found in normal people as well as those who had been sexually abused (including redness, discharge, tears outside the hymen area, and thickening of the external skin or the area around the hymen); category 3 consisted of findings that were highly suspicious of sexual abuse (including discharge associated with venereal diseases, teeth marks, tears or scars in the hymen); category 4 consisted of findings of definite evidence of sexual abuse (including pregnancy or evidence of sperm). Curtis placed the victim's examination results in category 2 as her findings were nonspecific. When asked which category of physical findings she would expect to place a child who came to her complaining of digital penetration of her vagina by an adult, Curtis responded that in the majority of cases there would be no physical findings, but

if there were, she would expect to place the findings in category 2.

The victim testified that at the time of trial she was 5 years old and lived with her mother and her sister. She remembered visiting the defendant when he touched her bottom with his finger. She indicated that her bottom was the area between her legs. She thought that he was "[l]ooking for boogers" when he touched her bottom. The victim stated that the incident occurred during the day while she and the defendant were in the living room watching television and everyone else was outside. She was sitting on the couch and her father was standing beside her. Afterwards, the defendant told her not to tell anyone. Another incident occurred when she and the defendant were in the backyard during the day, everyone else was inside the house, and the defendant again touched the place between her legs with his hand. He did not say anything to her. The victim subsequently told her mother because she "thought maybe she [could] do something about it." She told her mother that he did "something bad." The victim stated that she has two private parts which she calls her bottom. She indicated that one of the private parts was in the front of her body and one was in the back. She indicated that the defendant touched her front private part and that no one else had touched her front private part.

On cross-examination, the victim stated that it had been a long time since she saw the defendant, and she did not want to see him because he did something to her that she did not like. The victim referred to the prosecutor as "Miss Sissy" and said she met with her on two previous occasions. When defense counsel asked the victim if the

prosecutor told her what to say, the victim responded, "Yes," but when asked what the prosecutor told her to say, the victim stated that she forgot. The victim indicated that her mother did not tell her what to say during the trial or to the prosecutor but that she always did what her mother told her to do. She knew that her mother did not like her father, but her mother did not get upset when she visited him.

Cathy Behrens, the victim's mother, testified that she was formerly married to the defendant. After she and the defendant divorced, she obtained custody of their two daughters and the defendant acquired visitation rights. On Friday, April 17, 1992, Ms. Behrens was preparing the children to visit the defendant for the Easter weekend when the victim told her that she did not want to go to the defendant's home because he was "so mean." When Ms. Behrens asked her why he was mean, the victim told her because "he did to my bottom." Ms. Behrens asked the victim to show her what she meant, so the victim sat down and pointed between her legs. Ms. Behrens asked the victim if she was referring to the front bottom or the back bottom, and the victim told her the front bottom. Ms. Behrens explained that the victim used the term bottom to refer to both her vaginal area and her anal area. Ms. Behrens asked the victim where the incident occurred and the victim told her that it took place at the defendant's house. Ms. Behrens was unable to obtain more information from the victim; later that same day, she took the victim to the sheriff's office, spoke with Cardinale out of the presence of the victim, and told him why they were at the office. She did not tell him any details about what

the victim had told her. Cardinale subsequently interviewed the victim out of the presence of Ms. Behrens. Ms. Behrens denied coaching the victim or making any suggestions to her as to what she should say. The following week the victim was interviewed by Cardinale and Vaught and subsequently physically examined by Curtis. Ms. Behrens went with the victim to see Curtis, and she and Vaught gave Curtis the history of the case. The victim was also evaluated by Judy Laurendine and continued to be counseled by her at the time of trial.

Ms. Behrens stated that, although her relationship with the defendant was not good, it was civil at one time and she would not tell the victim to lie about the defendant because of her personal feelings for him. She admitted that she previously had been convicted of shoplifting.

On cross-examination, Ms. Behrens admitted that the victim did not give her a particular time when the incident occurred so she developed the time frame of two to four weeks before April 17th based on the victim's behavior and the last visitations she had with the defendant. She stated that when the court allowed the defendant to have overnight visitation with their daughters she was not pleased but she was not extremely upset.

Mary Smith testified as a witness for the defense. She indicated that she and her two sons lived with the defendant during the time in question. She stated that, during that time, there were only three occasions when the victim visited the defendant and she was not present. On two occasions, she took her son to a soccer game so the defendant and her other son picked up the defendant's daughters and met her at the game. The third occasion

occurred when Smith stayed home with her son who had the chicken pox while the defendant picked up the victim and her sister from day care. Smith never observed any inappropriate contact between the defendant and the victim. She claimed that the defendant did not come into contact with the victim's genital areas even for hygienic purposes. Smith did not leave the victim alone with the defendant, and if she left the house, the victim and the victim's sister went with her.

On cross-examination, Smith admitted that she left the victim alone with the defendant on an additional occasion but that other adults were present. Smith was not always physically present with the victim at the defendant's home, but she stayed in close proximity at all times.

Larry Hansen testified that he was a friend of the defendant, regularly visited the defendant's home, and recalled being at the defendant's home a number of times when the victim visited. He remembered visiting the defendant when the victim was present and Smith was away, but he stated that it did not happen very often. He did not observe any inappropriate behavior between the defendant and the victim. When asked when he was at the defendant's home if the defendant spent the time primarily with him, Hansen responded, "Well, no, sometimes he didn't pay attention to me."

Cardinale was recalled to the stand by defense counsel. He stated that, when he spoke to Ms. Behrens on April 17th, she told him that she was talking to the victim about going to the defendant's house for Easter and the victim told her that she did not want to go because she

was scared. The victim then indicated to Ms. Behrens that the defendant had touched her "on the private." He interviewed the victim but did not tape-record the interview because he was only trying to gather the initial information. During the April 17th interview, the victim talked about only one incident where the defendant touched her vaginal area while in the bedroom of his house. She did not give him a specific date as to when the incident occurred. Cardinale admitted that in the April 20th taped interview, the victim talked about the defendant touching her buttocks, but that she had not told him about that in the April 17th interview.

Sherry Siglar, a social service specialist with OCS, testified that she was involved with the defendant and his family through December 1991 and felt that there was a conflict between the defendant and Ms. Behrens involving visitation. She recalled a letter that she sent to the court during that period wherein she stated the defendant had expressed his dissatisfaction with the supervised visitation arrangement and that it was her opinion that Ms. Behrens would be dissatisfied with any visitation arrangement.

Louise P. Draper, an assistant district attorney in charge of child abuse prosecution, was called to testify by the defense. She met with the victim in order to make the determination as to whether or not the district attorney's office would prosecute the case. She explained that, throughout a normal prosecution process, she would talk to the child/victim and take him/her into the courtroom to try to make him/her as comfortable as possible for the trial. She met with the victim in the instant case prior to trial and talked with her once or twice before bringing

her to court. Defense counsel asked Draper about some inconsistencies in statements made by the victim. Draper stated that, when she talked with the victim, the victim told her that the defendant touched her on top of her clothes and other times she said he touched her underneath her clothes. The victim was also inconsistent with regard to the number of incidents, as sometimes she said it happened twice, while other times she stated that it happened once.

Richard Cicinelli, an expert in the field of psychiatry, testified that he interviewed the defendant and Ms. Behrens prior to the instant crime. He felt that Ms. Behrens viewed her husband in a negative light.

Dr. Steven David Thurber, an expert in the field of clinical and pediatric psychology and child development with a special emphasis on investigation of child sexual abuse, testified as to the memory processes of a 4-year-old child and possible contaminants in interviewing a child victim. Thurber stated that he reviewed the April 20, 1992 tape-recorded interview of the victim by Cardinale and Vaught. He stated that the interview contained contaminants that included coercion and leading questions and noted specific instances from the interview. He also indicated that there was the possibility of a carryover effect from a contaminated interview to subsequent interviews, evaluations, and investigations. On cross-examination, Thurber admitted that some good questions were asked in the interview and not all of the questions were leading or coercive.

The defendant testified that he was the victim's father and that he did not touch the victim in a sexual

manner. He admitted that in 1990 he was arrested in connection with allegations of sexually abusing his other daughter but subsequently was acquitted of those charges. He and Ms. Behrens were divorced; she had custody of the children but he had visitation rights. He explained that, in November 1989, he was granted overnight visitation every other weekend which continued until March 1990, when he was arrested in connection with the allegation of abusing his other daughter. From the time of his arrest until December 1991, he was allowed only supervised visitation. In December 1991, he resumed overnight visitation every other weekend. During December 1991 through April 1992, Mary Smith and her two sons resided with the defendant at his home. Although Smith was present whenever the victim visited, there were three occasions when he picked up the victim and met Smith at the house or soccer field. The defendant also remembered an occasion when Smith was not present while the victim was at his house but other adults were present. He made every possible effort to make sure that he was not alone with his children. He had previously not had holiday visitation with his children, and the Easter weekend of 1992 would have been the first holiday visitation.

On cross-examination, the defendant acknowledged at least one occasion when Smith was not present at his home when the victim was there. He said Larry Hansen was present, and he and Hansen remained in the kitchen during that time. He remembered the situation because he made sure that someone was always with him if his children visited.

Defense counsel played the April 20, 1992 tape-recorded interview of the victim by Cardinale and Vaught for the jury. In the interview, the victim indicated that the defendant touched her vaginal area and her buttocks with his hand.

The guilty verdict returned in this case indicates that, after considering the credibility of the witnesses and weighing the evidence, the jury accepted the testimony of the State witnesses and rejected that of the defense witnesses. This court will not assess the credibility of the witnesses or reweigh the evidence.

After reviewing the record, we find that the evidence supports the jury's determination. We are convinced that a rational trier of fact, viewing all the evidence as favorable to the prosecution, could have concluded that the State proved beyond a reasonable doubt that the defendant was guilty of molestation of a juvenile. The trial court did not err in denying the defendant's motion for post verdict judgment of acquittal. These assignments of error are without merit.

ASSIGNMENT OF ERROR NUMBER 2

In assignment of error number 2, the defendant contends that the State failed to prove that the alleged offense occurred in St. Tammany Parish. In his brief to this court, the defendant argues that there was no evidence presented at the instant trial to prove venue. Defense counsel argues that this is not a claim of improper venue but a claim of no proof of venue.

Venue is not an essential element of the offense; rather, it is a jurisdictional matter. Objections to venue must be raised by a motion to quash to be ruled on by the court in advance of the trial. At the hearing, the burden is on the State to prove venue by a preponderance of the evidence. La. C.Cr.P. art. 615; *State v. Roblow*, 623 So.2d 51, 55 (La. App. 1st Cir. 1993). Because the defendant did not file a motion to quash raising venue as an issue, we find no merit to his argument. *See State v. Matthews*, 632 So.2d 294, 296 (La. App. 1st Cir. 1993). Moreover, after reviewing the record, it does appear that proper venue was proven as the victim testified that the instant offenses occurred at the defendant's home, and the defendant testified that he lived in Slidell, Louisiana. Slidell is in St. Tammany Parish and that is the parish in which the defendant was tried. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 4

In assignment of error number 4, the defendant contends that the trial court erred in denying his alternative motion for a new trial. In his brief to this court, the defendant states that his argument is the same as set forth in assignments of error numbers 1, 2, and 3. Having found these assignments of error to be meritless, we likewise conclude that this argument regarding assignment of error number 4 has no merit.

ASSIGNMENTS OF ERROR NUMBERS 5 AND 6

In assignment of error number 5, the defendant contends that the trial court erred in refusing to permit

discovery and inspection by the defendant of the resumé of Detective Cardinale's April 17, 1992 interviews of the victim and her mother. In assignment of error number 6, the defendant contends that the trial court erred in denying his motion for new trial based upon the State's failure to disclose "*Brady* material" and in not permitting defendant discovery and inspection. In his brief to this court, the defendant argues that this court is empowered under La. C.Cr.P. art. 851 to grant a new trial based upon the State's failure to disclose *Brady* material. The defendant claims that, immediately prior to the commencement of the instant trial, he was informed by the State for the first time as to the existence of a resumé of Cardinale's April 17th interview of the victim which was represented by the State as not constituting part of Cardinale's initial report. After an in camera inspection, the trial court refused to permit discovery of the resumé. However, the defendant subsequently discovered the contents of the resumé and found that it contained inconsistent statements by the victim. He contends that, although Cardinale's trial testimony established that the victim made certain material inconsistent statements to him, the full extent of the inconsistent statements could not have been ascertained by the defendant without discovery and inspection of the April 17th resumé. He claims that this was the type of information requested in his motions for discovery. He claims the resumé contained both impeachment and exculpatory evidence, and if it had been disclosed prior to trial, he would have handled his defense differently. He claims that, had he had this resumé, he would have been able to build his entire defense on the

victim's concern about the defendant spanking her, which might have led her to make the allegations against him.

The suppression of evidence favorable to an accused by the prosecution violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). *See also Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995). Evidence favorable to an accused includes exculpatory evidence as well as evidence which can be used to impeach prosecution witnesses. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682 and 685, 105 S.Ct. at 3383 and 3385.

In reviewing materiality, this court must provide a cumulative evaluation of the suppressed evidence, keeping in mind that the defendant does not have to show that, with the addition of the undisclosed evidence, his trial would have resulted in acquittal, or that there would be an insufficiency of the evidence to support a conviction. The defendant need only show that "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *State v. Marshall*, 94-0461 and 81-3115 (La. 9/5/95), 660 So.2d 819, 826 (quoting *Kyles v. Whitley*, ___ U.S. at ___, 115 S.Ct. at 1569). Once a reviewing court applying *Bagley* has found constitutional error, the error cannot subsequently

be found harmless. *Kyles v. Whitley*, ___ U.S. at ___, 115 S.Ct. at 1566.

In the instant trial, the defendant filed pretrial discovery motions wherein he asked the State to provide him with a variety of exculpatory evidence. The defendant claims that just prior to trial he was made aware of the resumé of Cardinale's April 17th interview with the victim. Prior to the beginning of the trial, the defendant requested the resumé. After an in camera inspection, the court denied the defendant access to the resumé. The court stated that it felt that the resumé did not contain any exculpatory material from which the defendant could benefit.

The defendant subsequently filed a motion for new trial. At the hearing on the motion, defense counsel argued that he had reviewed the resumé and claimed that had he had access to the resumé he would have handled the defense differently. The court denied the defendant's motion for a new trial responding that it had reviewed the resumé and did not think there was anything of such significance that would rise to the level of *Brady* material which would entitle him to the resumé.

After reviewing the resumé, we are unable to find that it rises to the level of *Brady* material. It does not appear that it would have changed the outcome of the trial if the defendant had presented the spanking statements as the victim's reasons for bringing these charges, or if the inconsistent statement had been introduced, since other inconsistencies in the victim's testimony had been presented to the jury during the trial. Additionally, although the defendant claims that the resumé should

have been given to him as part of the initial report, according to La. R.S. 44:3(A)(4)(a) and (b), the resumé, which included a summary of Cardinale's April 17th interview of the victim and summaries of succeeding interviews and investigations, is not required to be contained in the initial report. Thus, we do not find that the trial court erred in denying the defendant's motion for a new trial. These assignments of error are without merit.

ASSIGNMENTS OF ERROR NUMBERS 7 AND 8

In assignment of error number 7, the defendant contends that the trial court erred in curtailing his examination of the victim during her competency hearing. In assignment of error number 8, the defendant contends that the trial court erred in ruling that the victim was competent to testify. In his brief to this court, the defendant contends that, during questioning of the victim, it was shown that she tended to decide whether or not a statement was a lie by first viewing the consequences of the statement.

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. La. C.E. art. 601. Understanding, and not age, is the test of whether any person shall be sworn as a witness. The determination by the court that a child is competent to testify as a witness is based not only upon the child's answers to questions testing his understanding, but also upon the child's overall demeanor on the witness stand. *State v. Bennett*, 591 So.2d 1193, 1195 (La. App. 1st Cir. 1991), *writ denied*, 594 So.2d 1315 (La. 1992). The trial court's determination as to whether or not a child has

sufficient understanding to testify is entitled to great weight because the trial court has the advantage of seeing and hearing the witness. Therefore, the trial court is vested with wide discretion in determining the competency of child witnesses; and on appeal, its ruling is entitled to great weight and will not be disturbed in the absence of manifest error. *State v. Bennett*, 591 So.2d at 1195.

After reviewing the record, we find no error in the trial court's decision to allow the victim to testify. Out of the jury's presence, the victim was examined in order to determine her competency. The victim stated her age, her birthday, her sister's name and age, and that she was home-schooled. The prosecutor asked her if she knew the difference between telling the truth and telling a lie. The victim responded that telling the truth meant that "you're telling the right thing" and telling a lie meant that "[y]ou're telling the wrong thing." The victim indicated that she previously had been punished for telling a lie. She agreed that everything she stated while in the courtroom would be the truth, and she promised to tell the truth. When asked by defense counsel if it were "ever okay to lie" she responded, "No." She admitted that she had told a lie in the past about being sick. The victim knew the difference between right and wrong because her mother told her the difference and she always did what her mother told her to do. When given an example of something that was not the truth, the victim was able to state that it was not the truth.

The trial court allowed defense counsel to question the victim but disallowed certain questions after objections by the prosecutor. However, after reviewing the

record regarding the qualification of the victim to testify, we are unable to find that the trial court unduly curtailed defense counsel's questioning of the child or abused its discretion in finding the victim to be competent. Moreover, the defendant failed to proffer this testimony into the record. In order to preserve the right to appeal an erroneous trial court ruling relating to the exclusion of evidence, the defendant must make the substance of the evidence known to the trial court. La. C.E. art. 103(A)(2). The purpose of an offer of proof is to create a record of the excluded evidence so that the reviewing court will know what the evidence was, and will be able to determine if the exclusion was improper, and if so, whether or not the improper exclusion constituted reversible error. *See State v. Adams*, 537 So.2d 1262, 1265 (La. App. 4th Cir.), *aff'd in part, rev'd in part on other grounds*, 550 So.2d 595 (La. 1989). Because the defendant failed to make a proffer of the victim's testimony, we are unable to review the evidence, and thus, he is procedurally barred from advancing this argument on appeal. *See State v. Lynch*, 94-0543 (La. App. 1st Cir. 5/5/95), 655 So.2d 470, 480, *writ denied*, 95-1441 (La. 11/13/95), 662 So.2d 466. These assignments of error are without merit.

ASSIGNMENT OF ERROR NUMBER 9

In assignment of error number 9, the defendant contends that the trial court erred in permitting Cathy Behrens to invoke a privilege against revealing evidence regarding her request to the Archdiocese of New Orleans for a declaration of nullity of her marriage to the defendant. In his brief to this court, the defendant argues that Ms. Behrens was aware that any communication made

between her and the archdiocese would be disclosed to the tribunal and possibly to the defendant and other interested parties. He claims that, because the communication made by Ms. Behrens to the Archdiocese of New Orleans was not for the primary purpose of spiritual advise [sic] or consolation, no clergyman-penitent privilege existed in her favor, and even if a privilege existed, it had been waived. He contends that, as a claimant in a pending request for nullity, Ms. Behrens stood to benefit in the event that the defendant was convicted, and the exclusion of this evidence prejudiced the defendant in his attempt to show the motive on the part of Behrens.

Louisiana Code of Evidence article 511(B)[2] states that a person has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser. Louisiana Code of

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[2] The communication at issue in this assignment of error, Cathy Behrens' application for nullity with the Archdiocese of New Orleans, was dated December 31, 1991, and actually submitted by her on July 22, 1992. At the time the communication was made, the law governing the clergyman-penitent privilege was found in former La. R.S. 15:477, which was repealed by 1992 La. Acts. No. 376, effective January 1, 1993. At the trial of this case, when the privilege was claimed by Ms. Behrens, the law governing the clergyman-pentinent privilege was found in La. C.E. art. 511, which became effective January 1, 1993, and which superseded former La. R.S. 15:477. Because we find that the claim of privilege in this case would be valid under either statute, we cite La. C.E. art. 511 in this opinion but need not decide which statute applies to Cathy Behrens' claim of privilege.

Evidence article 511(A)(1) defines clergyman as a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him. Section 2 of Article 511(A)(2) states that a communication is "confidential" if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication. According to La. R.S. 14:403(B), in any proceeding involving sexual abuse of a child, evidence may not be excluded on any ground of privilege, except in the case of communication between an attorney and his client or a clergyman and his communicant.

In the instant case, the Archdiocese of New Orleans filed a motion to quash the subpoena duces tecum filed by the defense requesting the records of Ms. Behrens' annulment proceedings. A hearing was held prior to the beginning of the trial and the trial court denied the motion to quash; however, the court stated that it was not ruling on the admissibility of the evidence. The records were placed in an envelope and made available to the defense.

Defense counsel subsequently attempted to question Ms. Behrens about her attempt to annul her marriage to the defendant. The court informed Ms. Behrens that this testimony was privileged and she could choose not to answer the questions. After answering a few questions by defense counsel, Ms. Behrens stated that she wanted to exercise her privilege. Defense counsel objected because he did not think the privilege authorized by article 511 applied to a "tribunal situation." The court responded that the tribunal was made up of priests and it did not

think defense counsel could challenge that privilege. Ms. Behrens stated she would rather not talk about the annulment proceedings because they were a "sacred church thing."

We agree that this situation clearly falls under the testimonial privileges set forth in La. C.E. art. 511. Ms. Behrens filed her petition for annulment with the priest as a spiritual advisor with the expectation of privacy. We are unable to find that the trial court erred in allowing Ms. Behrens to assert her privilege. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 10

In assignment of error number 10, the defendant contends that the trial court erred in curtailing his direct examination of Steven David Thurber, Ph.D. In his brief to this court, the defendant contends that the trial court erred in limiting Thurber's testimony as he was not allowed to testify that, in his opinion, the contamination of the victim's interview resulted in a contamination of the entire criminal proceeding against the defendant. He claims that the trial court's application of *State v. Foret*, 628 So.2d 1116 (La. 1993), prejudiced his attempt to show the unreliability of the victim's trial testimony, and *Foret* was inapplicable because there was no attempt to introduce "CSAAS[Child Sexual Abuse Accommodation Syndrome]-based evidence." He claims that Thurber was not allowed to testify that matters involving child custody present the highest rate of false allegations of child sexual abuse.

In the instant case, a hearing was held out of the presence of the jury. Dr. Steven David Thurber, a clinical psychologist, testified that he reviewed the tape of the April 20, 1992 interview of the victim and was prepared to discuss the contaminants that may have appeared in the interview process and memory processes of children the age of the victim. Thurber stated that he was not prepared to express an opinion as to whether or not the contaminants rendered the statement unworthy of belief, but that he would discuss the effects of the contamination and how it affected the trustworthiness or credibility of the statement. He also stated that he would give his opinion as to whether the technique used in interviewing the victim was proper or improper. He explained that his opinion would be a psychological opinion based on research evidence. The prosecutor then objected to any questions that may be asked of Thurber regarding the contamination of the statement. The trial court responded that Thurber's opinion regarding the effects of the contaminants upon credibility and trustworthiness "just flies in the face of Foret" and would require a *Foret* hearing.

Defense counsel stated that Thurber would not be asked how the contamination specifically affected this victim, but Thurber would testify in general terms about the effect of an earlier contamination on subsequent statements made by a victim. The court stated that Thurber would have to avoid the words "credible" and "trustworthy" and limit use of the term "effect." The trial court stated that *Foret* applied to both the prosecution and the defense. Defense counsel stated that he disagreed with the court's interpretation as he felt *Foret* was limited to specific prosecution witness testimony. The court stated

that under *Foret* an expert cannot comment as to whether or not in his opinion a witness is trustworthy, credible, or telling the truth. Defense counsel again stated that he disagreed with the trial court's interpretation of *Foret*. Thurber then was questioned about his testimony, and the trial court instructed that Thurber could not imply or state that the contaminants created an untrustworthy or non-credible declarant in the interview. Defense counsel did not object to this limitation by the trial court. The prosecutor stated that he was satisfied and did not feel that a full *Foret* hearing was necessary.

After the jury returned, Thurber was qualified as an expert in clinical and pediatric psychology and child development with a special emphasis on the investigation of child sexual abuse. After explaining several means by which an interview can be contaminated, Thurber testified that he reviewed the victim's tape-recorded interview and felt that there were a number of contaminants in the interview. He pointed out some specific instances of contamination. He also indicated that, when an interview is contaminated, there is a possibility of a carryover effect from the contaminated interview to subsequent interviews, evaluations, and investigations.

In *Foret*, the Louisiana Supreme Court found that admission of testimony by a psychologist using the dynamics of Child Sexual Abuse Accommodation Syndrome as a credibility evaluation tool was reversible error, as the evidence of the psychological evaluation of the victim using this test was determined to be of highly questionable scientific validity and failed to pass the threshold test for scientific reliability set forth by the United States Supreme Court in *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In the instant case, the trial court did not discuss whether or not Thurber's testimony was scientifically reliable, but the court felt that testimony by Thurber regarding his opinion of the effects of the contaminants on the credibility or trustworthiness of the victim's interview was not admissible under *Foret*. After reviewing the record, we agree with the defendant that *Foret* does not apply in this case because Thurber's testimony was not "CSAAS-based evidence," nor did he intend to express a specific opinion as to the victim's credibility in this case. However, the trial court has broad discretion in determining whether expert testimony is admissible. La. C.E. art 702, comment (d); *State v. Billiot*, 94-2419 (La. App. 1st Cir. 4/4/96), 672 So.2d 361, 373. We are unable to say that the trial court abused its discretion by instructing Thurber not to imply or state that contaminants in an interview create an untrustworthy and incredible declarant in an interview.

Defendant also argues that the trial court erred in limiting Thurber's testimony as he was not allowed to testify that, in his opinion, the contamination of the victim's interview resulted in a contamination of the entire criminal proceeding against the defendant. The record shows that, in addition to discussing the contaminants contained in the interview of the victim, Thurber did testify regarding the possible carryover effect from a contaminated interview to subsequent interviews, evaluations, and investigations. We see no significant difference in this testimony and the testimony which the defendant claims should have been allowed. Any difference had

little effect on the overall probative value of Thurber's testimony.

Additionally, although the defendant contends that the trial court erred in not allowing Thurber to testify that matters involving child custody present the highest rate of false allegations of child sexual abuse, the defendant failed to proffer this testimony by Thurber. The defendant points out in his brief that the trial court excluded this testimony in a conference held in the court's chambers prior to the preliminary hearing regarding Thurber's testimony. As previously noted, in order to preserve the right to appeal an erroneous trial court ruling relating to the exclusion of evidence, the defendant must make the substance of the evidence known to the trial court. La. C.E. art. 103(a)(2). Because the defendant failed to make a proffer of Thurber's testimony, we are unable to review the evidence, and thus, he is procedurally barred from advancing this argument on appeal. *See State v. Lynch*, 655 So.2d at 480; *see* also State v. Adams, 537 So.2d at 1265. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 11

In assignment of error number 11, the defendant requests a review of the record for any patent errors. This court routinely reviews the record for errors patent, whether or not such a request is made by a defendant. Under La. C.Cr.P. art 920(2), we are limited in our patent error review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these

proceedings, we have found no reversible patent errors. However, we note that, although the minutes do not indicate that the defendant was given credit for time served, the transcript reveals that in imposing the sentence the trial court actually gave the defendant credit for time served. Since there is a discrepancy between the minutes and the transcript, the transcript must prevail. *See State v. Lynch*, 441 So.2d 732, 734 (La. 1983). Therefore, we remand the matter to the trial court for correction of the minute entry.

ASSIGNMENT OF ERROR NUMBER 12

In assignment of error number 12, the defendant contends that the trial court erred in denying his motion for new trial based upon the newly discovered evidence involving Susan Vaught's bias and prejudice, her defect of capacity, and her habitual intentional misrepresentation of her educational background. In his brief to this court, the defendant claims that, according to a transcript from a separate juvenile proceeding, Vaught was a victim of parental sexual abuse and misrepresented herself with regard to her education. Thus, the defendant claims he was prejudiced by the State's repeated attempts to underscore Vaught as an impartial investigator as she was not impartial and suffered from a defect of "capacity." The defendant alleges he did not become aware of this information until after the trial and he had no reason to try to impeach Vaught at trial. He claims that because the case hinged upon credibility of the victim, and because Vaught interviewed the victim, this information was important because she was unable to fairly evaluate the victim. He also claims that, because of her problems, Vaught was

unable to carry out the policies of the OCS. The defendant contends that, had he known of Vaught's problems, he would have used the information to impeach her credibility. He claims that, had this evidence been introduced, it probably would have changed the verdict as Vaught's contact with the victim rendered any statements by the victim unreliable.

Louisiana Code of Criminal Procedure article 851 lists the circumstances under which a trial court should grant a motion for new trial. Article 851 provides, in pertinent part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> * * *
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty. . . .

In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from that rendered at trial. Furthermore the trial court's decision on

a motion for new trial will not be disturbed absent a clear abuse of discretion. *State v. Maize*, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, *writ denied*, 95-1894 (La. 12/15/95), 664 So.2d 451.

In the instant case, the defendant filed a motion for new trial wherein he claimed that new and material evidence, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, but was then available, and if the evidence had been introduced at trial, it probably would have changed the verdict. In his memorandum in support of his motion for new trial, the defendant argued that in interviewing the victim, Vaught used leading questions which contaminated the interview, and thus, contaminated any subsequent statements by the victim. The defendant claimed that he was prejudiced because Vaught contended that she was an impartial investigator, but instead she suffered from a defect of capacity because she was a victim of parental sexual abuse, which was discovered after the trial, and because Vaught stated at trial that she had a master's degree in psychology, when in fact, she had a master's degree in education with a minor in psychology. The defendant also learned that, in an unrelated juvenile proceeding, Vaught misstated her qualifications, she made misstatements in a federal proceeding, and in a nonjudicial context, Vaught lied about her education background and other matters. The defendant asserted that, had he known about the newly discovered material, he would have based his defense on Vaught's victimization as the underlying reason for the allegations against him, and he would have used the information to destroy her credibility.

In its reasons for denying the motion for new trial, the trial court stated that Vaught conducted the investigation into the victim's allegations of molestation at the same time as Cardinale. Vaught investigated on behalf of OCS for possible civil remedies while Cardinale investigated for possible criminal charges. They interviewed the victim together and tape-recorded the interview. The court stated that Vaught's testimony was presented at trial only to show that an interview was conducted, and based on that interview, the victim was taken to Dr. Curtis for a physical examination and further interviews of potential witnesses were conducted by the OCS. Vaught did not testify as to the substance of the interviews or the weight that she gave the statements of the witnesses. Vaught did not testify as to her belief or disbelief of the truth of the statements, but only stated what her actions were based on those statements. Cardinale testified that, in addition to interviewing the victim, he interviewed others; and based on that information, he requested a warrant for the defendant's arrest. Cardinale's investigation was independent of Vaught's investigation with the exception of one joint interview with the victim. The court stated that it was unable to conclude that the defendant showed that Vaught's possible bias had any bearing on Cardinale's investigation or Dr. Curtis' findings. The court declared that the victim, her mother, and Dr. Curtis testified as to the truth of the allegations, and that Vaught's testimony was merely to show the chain of events in the investigation and not the truth of the allegations. Additionally, the court noted that, during trial, the defendant attempted to attack Vaught's credibility through his expert witness, Dr.

Steven Thurber; however, the jury was apparently unconvinced by this attempt. The trial court stated that, after careful consideration of the defendant's new evidence, it was unable to conclude that it was so material that it probably would have produced a different verdict or that such evidence ought to produce a different verdict.

Initially, we note that the trial court must have determined that the defendant proved that the evidence was new and not discoverable prior to trial, as it did not address this issue in its reasons. Additionally, at the hearing on the motion for new trial, when the prosecutor argued that the evidence did not qualify as newly discovered evidence, the court stated that the evidence may not have been relevant "had he not known about some other things." There was no more discussion as to whether or not the evidence was newly discovered. Thus, apparently the court felt that the evidence in question qualified as newly discovered evidence.

After reviewing the record, we agree with the trial court's denial of the motion for new trial. Vaught did testify that she had a master's degree in psychology; however, she stated that she interviewed the victim as part of her job as a social service specialist with the OCS. She testified at trial that it was customary for the OCS to become involved in the investigations of allegations of sexual abuse along with the St. Tammany Parish Sheriff's Office, and she only became involved in the instant case after it was reported to the OCS. Vaught claimed that she was an impartial investigator and had not formed an opinion regarding the case. Vaught interviewed the victim with Cardinale, who was also investigating the victim's allegations. She testified that based upon the

victim's interview, she sent the victim for a physical examination. Vaught did not discuss the substance of the interview or her opinion regarding the interview or the case. On cross-examination, defense counsel questioned Vaught about asking leading and repetitive questions during the interview. Cardinale testified at trial regarding the contents of the interview. Additionally, the defendant called Dr. Thurber to testify as an expert to criticize Vaught's interview with the victim.

Considering the above, we find that the trial court did not abuse its discretion in denying the defendant's motion for a new trial. We are unable to say that this evidence is so material that it would produce a different result from the verdict reached. The evidence regarding Vaught was insufficient to change the outcome of the trial as Vaught's role in the trial was minimal. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 13

In assignment of error number 13, the defendant contends that the trial court erred in refusing to order disclosure of the medical records of Susan Vaught pursuant to subpoenas duces tecum issued to H.S.A. Greenbrier Hospital, Kay Miller, and Steve Taylor, M.D., in connection with the hearing on the defendant's motion for new trial referenced in assignment of error number 12. In his brief to this court, the defendant argues that, under La. R.S. 14:403(B), Vaught had no privilege which would prohibit the release of her medical records. He claims Vaught's medical records were relevant and material to his motion for new trial.

After a hearing, the court granted the State' motion to quash subpoenas duces tecum filed by the defendant with regard to the records of Greenbrier Hospital, Miller, and Taylor and their connection to Vaught. The court stated that the health care provider-patient privilege existed until January 1, 1993 when the privilege became nonexistent under La. C.E. art 510. The court stated that it did not think La. R.S. 14:403(B) applied to the situation.

Louisiana Revised Statute 14:403(B) states that in any proceeding involving the sexual abuse of a child, evidence may not be excluded on any ground of privilege, except in the case of a communication between an attorney and his client or between a clergyman and his communicant. The trial court may have erred under this statute in granting the motion to quash the subpoenas duces tecum based on the privilege of health care provider and patient. However, the statute is very broad and we are inclined to agree with the trial court in that the statute probably was not intended to apply to situations where medical records of witnesses and non-parties are sought, and certainly not in the instant situation, where the defense was attempting to obtain the medical records of an inconsequential witness. Louisiana Code of Evidence article 510(C)(2)(f) also states that there is no privilege as to communication which is relevant to an investigation of or prosecution for child abuse. The article clearly states that there is no privilege when the communication is "relevant." Therefore, while the trial court may have erred under La. R.S. 14:403(B) in quashing the subpoenas duces tecum, we find any error to be harmless beyond a reasonable doubt. Vaught's medical records sought by the defendant were not relevant to the guilt or

innocence of the defendant. Vaught's role in the trial was minimal and information regarding Vaught's medical history would not likely have changed the outcome of the trial. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 14

In assignment of error number 14, the defendant contends that the trial court erred in permitting Susan Vaught to invoke a testimonial privilege as to Kay Miller's treatment of her. In his brief to this court, he contends that, under La. R.S. 14:403(B), Vaught would not be permitted to invoke a testimonial privilege as to her treatment by Kay Miller, a licensed professional counselor. He claims that the testimony was relevant and material to the motion for new trial and allowing Vaught to assert this privilege unfairly prejudiced him.

The defendant called Miller to testify at the hearing held on the motion for new trial, but after the court's ruling, he failed to proffer any testimony concerning Miller's treatment of Vaught. Miller testified that she had a professional relationship with Vaught as her licensed professional counselor until May 1990; and she testified concerning matters unrelated to her treatment of Vaught. However, defense counsel did not attempt to elicit any other information from Miller regarding her treatment of Vaught and did not proffer any testimony of this nature into the record.

As previously noted, in order to preserve the right to appeal an erroneous trial court ruling relating to the exclusion of evidence, the defendant must make the substance of the evidence known to the trial court. La. C.E.

art. 103(B)(2). Because the defendant failed to make a proffer of the testimony, we are unable to review the evidence, and thus, he is procedurally barred from advancing this argument on appeal. *See State v. Lynch*, 655 So.2d at 480; *see also State v. Adams*, 537 So.2d at 1265.

ASSIGNMENT OF ERROR NUMBER 15

In assignment of error number 15, the defendant contends that the trial court erred in refusing to permit testimony by Kay Miller, at the hearing held on the motion for new trial, except via proffer, regarding Susan Vaught's having illegally converted to her own use in 1991 substantial sums belonging to a business which she operated with Kay Miller. In his brief to this court, defendant argues that Miller's proffered testimony shows that Vaught suffered from a defect of capacity, and had this information regarding her deceptive and fraudulent acts been discovered prior to trial, the defendant would have been able to attack her credibility in the presence of the jury.

Miller testified at the hearing on the motion for the new trial. Defense counsel asked Miller about her business dealings with Vaught. The prosecutor objected to the relevancy of the information, and the trial court sustained the objection stating that the information was irrelevant. Defense counsel then proffered Miller's testimony regarding her previous business dealings with Vaught, which included misrepresentations regarding the inception of a business, missing funds invested by Miller, and Vaught's failure to repay all of the missing funds.

Louisiana Code of Evidence article 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The trial court found Miller's testimony regarding her business dealings with Vaught to be irrelevant. While we agree that the testimony may have been irrelevant as to the defendant's guilt or innocence, we feel that the testimony was relevant to Vaught's credibility as a witness and the potential new evidence regarding her credibility. However, any error by the trial court in disallowing the testimony at the hearing was harmless.

As previously noted, in a motion for new trial based upon the discovery of new and material evidence, the burden is on the defendant to show that the new evidence was not discoverable prior to or during trial, and that if the evidence had been introduced at trial, it probably would have caused the trier of fact to reach a different verdict. La. C.Cr.P. art. 851(3); *State v. Spears*, 504 So.2d 974, 979 (La. App. 1st Cir.), *writ denied*, 507 So.2d 225 (La. 1987); *see also State v. Maize*, 655 So.2d at 517.

After reviewing Miller's proffered testimony, we are unable to find that the defendant proved that this was new and material evidence that was not discoverable prior to or during the trial. Although it is not clear from the testimony, apparently Vaught's business relationship with Miller occurred before the instant trial, and thus, the defendant could have discovered this information prior to trial for use at trial. However, even assuming that the information was newly discovered, we are unable to find that this evidence was so material that it would have

produced a different result from the verdict reached. Vaught's role at the defendant's trial was minimal. The trial court did not abuse its discretion in denying the defendant's motion for new trial.

DECREE

The defendant's conviction and sentence are **AFFIRMED.** This case is **REMANDED** to the trial court for correction of the minute entry.

AFFIRMED AND REMANDED.

APPENDIX B

The December 23, 1996 decision of The First Circuit on Petition for Rehearing is reprinted in this Appendix.

NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 95/KA/1854

STATE OF LOUISIANA — Parish of St. Tammany

– VERSUS –

GARY BEHRENS

On application for Rehearing.

Rehearing DENIED

/s/ Burrell J. Carter
Burrell J. Carter

/s/ Randolph H. Parro
Randolph H. Parro

/s/ J. Michael McDonald
J. Michael McDonald

Filed Dec 23 1996

/s/ Stanley P. Lemoine
STANLEY P. LEMOINE, Clerk

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number: 95/KA/1854 DATE: DEC 23 1996

STATE OF LOUISIANA

VERSUS

GARY BEHRENS

CERTIFICATE OF MAILING

I hereby certify that a copy of the attached was mailed to all counsel of record, and all parties not represented by counsel this date as listed below.

/s/ Karen West
STANLEY P. LEMOINE,
CLERK
COURT OF APPEAL,
FIRST CIRCUIT

TO:

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APPENDIX C

The June 20, 1997 decision of the Supreme Court of Louisiana on Application for Writs of Certiorari, Prohibition and Mandamus is reprinted in this Appendix.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 97-K-0245

GARY BEHRENS

IN RE: Behrens, Gary; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Tammany 24th Judicial District Court Div. "A" Number 212039; to the Court of Appeal, First Circuit, Number KA 95 1854

June 20, 1997

Denied.

JPV
PFC
WFM
CDK
BJJ
CDT
JTK

LEMMON, J. not on panel.

Supreme Court of Louisiana
June 20, 1997

John Tarlton Olivier
Clerk of Court
For the Court